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Supreme Court of the United States

[redacted] Term, 1955

[redacted]

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, a/k/a JOHN HANCOCK [redacted]

Petitioner,

v.

WILLIAM S. [redacted]

Respondent.

PETITION FOR WRIT OF CERTIORARI

BRIEF IN SUPPORT THEREOF

[redacted]

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Supreme Court of the United States.

OCTOBER TERM, 1945.

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY AND FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

Petitioners,

v.

WILLIAM E. HURLEY (SUBSTITUTED FOR MERRITT THOMPSON, COLLECTOR OF TAXES),

Respondent.

PETITION FOR WRIT OF CERTIORARI.

Summary of Matters Involved.

This petition seeks a review of a decision of the Circuit Court of Appeals for the First Circuit affirming the judgment of the District Court for the District of Massachusetts entered January 31, 1945 (Record, pp. 6, 7), upon the motion of the Collector of the City of Boston, respondent herein, for summary judgment against John Hancock Mutual Life Insurance Company and Fidelity and Deposit Company of Maryland, petitioners herein, principal and surety, respectively, on a supersedeas bond filed June 30, 1944.

On June 22, 1944, the District Court ordered that the Clerk pay forthwith to the respondent from part of the money deposited in the registry of the Court on August 21, 1943, for or on account of the just compensation to be awarded for the condemnation of the interest in land taken, the sum of $19,998.09, "together with interest at the rate of $2.12 per day from May 15, 1944, to the date of payment" (Record 4030, p. 19). The amount of said deposit was $40,000 (Record 4030, p. 14).

On June 30, 1944, the petitioner John Hancock Mutual Life Insurance Company appealed from said order (Record 4030, p. 30) and filed with the Clerk a supersedeas bond in the sum of $1000 as principal with the petitioner Fidelity and Deposit Company of Maryland as surety (Record, p. 2), and subsequently the appeal was dismissed with costs of $20 to the appellee. After issuance of the mandate and on December 29, 1944, the Clerk paid to the respondent the sum of $20,095.61, being said sum of $19,998.09 specified in said order June 22, 1944, together with interest at the rate of $2.12 per day from May 15, 1944, to June 30, 1944, only when said supersedeas bond was filed (Record, pp. 5 and 10) instead of to date of payment.

On January 4, 1945, the respondent filed motion for summary judgment against the petitioners, principal and surety, respectively, on the aforesaid bond (Record, p. 3). This motion was heard upon oral arguments of counsel and on January 31, 1945, judgment against the petitioners in the amount of $604.39 was entered, computed as set forth in petitioners' narrative statement, being interest at the rate of 6% per annum on said sum of $20,095.61 from June 30, 1944 (when the supersedeas bond was filed), to January 31, 1945 (the date of the summary judgment), together with the costs of $20 taxed by the Circuit Court of Appeals against the petitioners, pursuant to its mandate dismissing said appeal (Record, p. 10). The District Court denied the

petitioners' motion for leave to deposit with the Court said sum of $20 admittedly due to the respondent. The petitioners appealed from the judgment against them entered January 31, 1945, excepting that part thereof with respect to said $20.

The petitioners by their appeal to the Circuit Court of Appeals challenged the judgment of the District Court on the grounds that it was based upon an improper construction of the supersedeas bond and of Federal Rules of Civil Procedure, Rule 73 (d) and (e), an improper construction of the order of the District Court dated June 22, 1944, and an improper interpretation of Federal Rules of Civil Procedure, Rule 73 (f), and, if so construed, said rules were invalid in that they violated the Seventh Amendment of the Constitution.

The jurisdiction of the Supreme Court of the United States is invoked under the provisions of the United States Code, 1940 Edition, Title 28, section 347.

The Questions Presented.

(1) Where the Clerk of the Court is ordered to pay forthwith to a claimant from the moneys deposited in the Registry of the Court for the condemnation of an interest in land taken in condemnation proceedings a certain sum together with interest at the rate of $2.12 per day to the date of payment, shall such order be construed to mean interest at the rate of $2.12 per day upon said sum to the date of the filing of a supersedeas bond?

(2) Where the mandate of the Circuit Court of Appeals affirming the judgment of the District Court did not give the District Court power to change the judgment entered originally by the District Court against a fund in custody of the District Court, by adding interest other than the

interest ordered originally, may the District Court add or detract from the judgment affirmed by the Circuit Court of Appeals?

(3) Shall Federal Rules of Civil Procedure, Rule 73 (d), (e) and (f), be construed to permit making a principal on a supersedeas bond a party defendant in proceedings for summary judgment?

(4) Do the Federal Rules of Civil Procedure apply, except with respect to appeals, to condemnation proceedings?

(5) If said rules are so construed, do they violate the Seventh Amendment of the Constitution of the United States?

Reasons Relied on for the Allowance of the Writ.

While there have been numerous decisions of the Supreme Court of the United States respecting liability of principal and surety on supersedeas bonds, this is the first occasion for the application of Federal Rules of Civil Procedure to a supersedeas bond in condemnation proceedings. If Rule 73 (d), (e) and (f) are to be construed to permit the entering of a summary judgment against the principal and surety on a supersedeas bond, the decision of the Circuit Court of Appeals would appear to be in conflict with the decisions of this Court in the following cases:

Jerome v. *McCarter,* 21 Wall. 17;
Supervisors v. *Kennicott,* 103 U.S. 554—

with the decision of the Circuit Court of Appeals for the First Circuit in—

Rosenstein v. *Tarr,* 51 Fed. 368 (D.C. Mass. 1892); affirmed, *per curiam,* 53 Fed. 112 (C.C.A. 1st, 1892);
Pike v. *Gregory,* 118 Fed. 128 (C.C.A. 1st, 1902)—

and with the decision of the Circuit Court of Appeals for the Third Circuit in—

> *Sprukes* v. *United States Fidelity & Guaranty Co.*, 138 F. (2d) 812 (C.C.A. 3d, 1943), with which the Circuit Court of Appeals in the case sought to be reviewed by this petition expressly recognized its decision to be in conflict.

The Circuit Court of Appeals has improperly applied the decision of this Court in—

> *Jerome* v. *McCarter*, 21 Wall. 17, and
> *Supervisors* v. *Kennicott*, 103 U.S. 554—

which improper application should be corrected.

Since supersedeas bonds are common in appeals, it is desirable that it be finally determined whether sureties thereon are to be held liable, not only for judgments against their principals, but also for summary judgments against their principals.

In the interest of brevity, your petitioners do not at this time set forth all the points which they urged on the argument of the appeal of this cause to the Circuit Court of Appeals, but, in order to comply with the rule of this Court, requiring of all issues upon which decision is requested to be presented in the petition for writ of certiorari, the petitioners here refer to and incorporate in this petition all of the matters presented in the "Statement of the Points" (Record, p. 9) with the same force and effect as if herein set out in full.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the First Circuit commanding said Court to certify and send to this Court for review and

determination on a day certain to be therein named a transcript of the record and proceedings therein and that the judgment of the Circuit Court of Appeals for the First Circuit and the District Court for the District of Massachusetts be reversed by this Honorable Court and your petitioners have such other and further relief as to this Honorable Court may seem just and proper.

JOHN HANCOCK MUTUAL LIFE
INSURANCE COMPANY,
By its Attorney,
G. K. RICHARDSON.

FIDELITY AND DEPOSIT
COMPANY OF MARYLAND,
By its Attorney,
G. K. RICHARDSON.

Supreme Court of the United States.

OCTOBER TERM, 1945.

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY AND FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
Petitioners,
v.
WILLIAM E. HURLEY (SUBSTITUTED FOR MERRITT THOMPSON, COLLECTOR OF TAXES),
Respondent.

BRIEF ON PETITION FOR WRIT OF CERTIORARI.

I.
Opinions of the Courts Below.

The memorandum of the District Court of June 14, 1944, is set forth in Record 4030, pp. 20-27. The order of the District Court dated January 31, 1945, appealed from is set forth in the Record, p. 6, and the opinion of the Circuit Court of Appeals for the First Circuit dated November 7, 1945, is set forth in the Record at pages 13 to 25, inclusive.

II.
Jurisdiction.

The jurisdiction of the Supreme Court of the United States is invoked under United States Code, 1940 Edition, Title 28, sec. 347.

III.
Statement of the Case.

On June 22, 1944, the District Court ordered that the Clerk pay forthwith to the respondent from part of the money deposited in the registry of the Court on August 21, 1943, for or on account of the just compensation to be awarded for the condemnation of the interest in land taken, the sum of $19,998.09, "together with interest at the rate of $2.12 per day from May 15, 1944, to the date of payment" (Record 4030, p. 19). The amount of said deposit was $40,000 (Record 4030, p. 14).

On June 30, 1944, the petitioner John Hancock Mutual Life Insurance Company appealed from said order (Record 4030, p. 30) and filed with the Clerk a supersedeas bond in the sum of $1000 as principal with the petitioner Fidelity and Deposit Company of Maryland as surety (Record, p. 2), and subsequently the appeal was dismissed with costs of $20 to the appellee. After issuance of the mandate and on December 29, 1944, the Clerk paid to the respondent the sum of $20,095.61, being said sum of $19,998.09 specified in said order June 22, 1944, together with interest at the rate of $2.12 per day from May 15, 1944, to June 30, 1944, only when said supersedeas bond was filed (Record, pp. 5 and 10) instead of to date of payment.

On January 4, 1945, the respondent filed motion for summary judgment against the petitioners, principal and surety, respectively, on the aforesaid bond (Record, p. 3). This motion was heard upon oral arguments of counsel and on January 31, 1945, judgment against the petitioners in the amount of $604.39 was entered, computed as set forth in petitioners' narrative statement, being interest at the rate of 6% per annum on said sum of $20,095.61 from June 30, 1944 (when the supersedeas bond was filed), to January 31, 1945 (the date of the summary judgment), together with the costs of $20 taxed by the Circuit Court of Appeals

against the petitioners pursuant to its mandate dismissing said appeal (Record, p. 10). The District Court denied the petitioners' motion for leave to deposit with the Court said sum of $20 admittedly due to the respondent. The petitioners appealed from the judgment against them entered January 31, 1945, excepting that part thereof with respect to said $20.

The petitioners by their appeal to the Circuit Court of Appeals challenged the judgment of the District Court on the grounds that it was based upon an improper construction of the supersedeas bond and of Federal Rules of Civil Procedure, Rule 73 (d), (e), an improper construction of the order of the District Court dated June 22, 1944, and an improper interpretation of Federal Rules of Civil Procedure, Rule 73 (f), and, if so construed, said rules were invalid in that they violated the Seventh Amendment of the Constitution.

The jurisdiction of the Supreme Court of the United States is invoked under the provisions of the United States Code, 1940 Edition, Title 28, sec. 347.

IV.

Specification of Errors.

The Circuit Court of Appeals erred—

1. In ruling that an order for the payment of money out of a condemnation fund is to be paid within ten days from said order under Federal Rules of Civil Procedure, Rule 62, contrary to the specific provision in Federal Rules of Civil Procedure, Rule 81 (7), that Federal Rules of Civil Procedure do not apply to proceedings in eminent domain except as to appeals.

2. In failing to rule that, pursuant to the Conformity Act of 1872, sec. 5; Mass. Gen. Laws (Ter. Ed.) c. 231, sec. 96, providing for twenty-day period, not ten as under Federal Rules for Civil Procedure, does not apply.

3. In ruling that Federal Rules of Civil Procedure, Rule 73 (d) and (e), is substantially different from Supreme Court Rule 36, formerly Supreme Court Rule 29, now numbered 36 in the Revised Rules of the Supreme Court of the United States.

4. In ruling that, after mandate by the Circuit Court of Appeals affirming the money judgment against the fund in the custody of the District Court, the District Court may add interest other than interest ordered originally.

5. In ruling that Federal Rules of Civil Procedure, Rule 73 (d), (e) and (f), permits making a principal on a supersedeas bond a party defendant in proceedings for summary judgment.

For a further statement of the errors alleged to have been omitted by the District Court and which the Circuit Court of Appeals by its opinion and order affirmed see Statement of Points (Record, p. 9).

V.
Argument.

The judgment of the District Court awarding appellee payment of its claim for taxes out of the fund was affirmed by the Circuit Court of Appeals with costs in the sum of $20. The mandate of that Court affirming the judgment of the District Court did not give the District Court power to change the judgment entered originally by it by adding interest other than the interest ordered originally. Without order from the Circuit Court of Appeals the District Court had no power to add to or detract from the judgment affirmed by that Court.

Rosenstein v. *Tarr*, 51 Fed. 368; affirmed, 53 Fed. 112.

Clark v. *Hot Springs Electric Light & Power Company*, 76 Fed. (2d) 918.

In *Rosenstein* v. *Tarr, supra,* at page 370, the Court says:

> "There is no doubt that a supersedeas bond conditioned according to the statute for prosecuting an appeal with effect and answering all damages and costs covers not merely compensation for delay arising from the appeal, but also the amount of the decree appealed from, so far as the latter directs the payment of money by the appellant to the appellee. . . .
>
> "It appears that there has been no judgment nor decree by either tribunal, directing payment of any interest, or other damages for delay, with reference to the amount in the registry of the court. It is elementary that in a suit on a supersedeas bond neither the principals nor the sureties can be mulcted beyond what the courts have adjudged as the result of the appeal to which the bond was incident. . . .

Interest as part of the original judgment was fixed at $2.12 per day until paid, which is 4% interest as provided in the statute.

Mass. Gen. Laws (Ter. Ed.) c. 59, sec. 57.

But here the District Court has sought to accomplish indirectly that which it could not accomplish directly. It has increased the interest awarded to the City upon its taxes from 4% to 6% and it has further found the appellant John Hancock Mutual Life Insurance Company and the appellant Fidelity and Deposit Company of Maryland, surety on the bond, liable for interest for which no liability against the principal appellant John Hancock Mutual Life Insurance Company existed by virtue of the judgment appealed from or the mandate dismissing the appeal.

The appeal bond and the motion for judgment on the bond were filed under the provisions of Rule 73 (d) and (e),

which rule is substantially the same as Circuit Court Rule 37 and Supreme Court Rule 36, formerly Supreme Court Rule 29. The present Rule 73 is based upon and was taken from the former Supreme Court Rule 29, now numbered 36 in the Revised Rules of the Supreme Court of the United States.

The precise point here in issue was early determined in *Jerome* v. *McCarter,* 21 Wall. 17, and in *Supervisors* v. *Kennicott,* 103 U.S. 554, by decisions construing Rule 29. A supersedeas bond is not an obligation to pay damages, interest and costs, but is an obligation to indemnify against loss which may result to the obligee on account of such items by reason of the appeal. In *Jerome* v. *McCarter,* 21 Wall. 17, it was held that the rule did not require security for the payment of all the accumulations of interest on the debt pending the appeal, but only indemnity against loss of such accumulation. There the Court said: "The object is to provide indemnity for loss by the accumulation of interest consequent upon the appeal, not for the payment of the interest."

In *Supervisors* v. *Kennicott* the Court refused to allow recovery of accumulated interest in an action on the bond, on the ground that the loss of interest was not sustained by reason of the appeal. The mere existence of the right to receive interest during that period is not sufficient to justify recovery of the accumulated interest by way of damages in an action on the bond. The mere fact that the claimant has not recovered such interest is not sufficient.

Supervisors v. *Kennicott,* 103 U.S. 554.

The proof must be that he has lost the accumulated interest and has suffered damage to that extent as a result of the delay incident to the appeal.

The judgment dated June 22, 1944, appealed from provided that interest at the rate of $2.12 per day should be

paid from the fund in the registry of the Court from May 15, 1944, to the date of payment. This judgment was affirmed by the Circuit Court of Appeals. By the express language of that judgment the appellee is entitled to receive from the fund interest to the date of payment at $2.12 per day, and, being so entitled, the appellee has suffered no loss by reason of the appeal. The judgment also provided that "such disbursement being without prejudice, to the right to the City of Boston or the Collector of Taxes for the City of Boston to claim further and additional damage for the condemnation of the interest in land taken in the above-entitled proceedings." Even if the decree did not give the Collector of Taxes the right to recover $2.12 to the date of payment and if that right was cut off upon the filing of the supersedeas bond, the right was reserved to the City to make further and additional claim against the condemnation fund. It is also to be noted the appellee claims a lien for its taxes until they are paid in full with interest, which lien includes its charges for interest (Mass. Gen. Laws (Ter. Ed.) c. 60, sec. 37), and the lien may still be enforced against the land and interest therein not taken in the condemnation proceedings. Until it appears that the appellee will be unable to recover the interest by enforcing its lien it has suffered no loss.

Error in Computation.

Even if the appellee was entitled to receive, as damages for the delay caused by the appeal, interest on the moneys withheld because of the appeal, the District Court has erred in the computation of that interest. His right to recover damages is limited to his loss. His loss cannot exceed what he was entitled to receive, to wit, interest at the rate of 4% (Mass. Gen. Laws (Ter. Ed.) c. 59, sec. 57), but the District Court has awarded interest at the rate of 6%. United

States Code, Title 28, sec. 811, and the Rules of the Circuit Court of Appeals for the First Circuit, Rule 33 (also see Moore's Federal Practice, page 93), provide that interest shall be allowed on judgments at such rate as is allowed by law on judgments recovered in the courts of such state. Mass. Gen. Laws (Ter. Ed.) c. 59, sec. 57, provides that taxes shall bear interest at the rate of 4%. With respect to interest, Mass. Gen. Laws (Ter. Ed.) c. 107, sec. 3, provides: "If there is no agreement or provision of law for a different rate, the interest of money shall be at the rate of six dollars on each hundred for year . . ." The 6% rate ordinarily applied in Massachusetts and consequently ordinarily applied by the Federal Court does not apply to the present case. A different rate is provided by law.

Mass. Gen. Laws (Ter. Ed.) c. 59, sec. 57.

Error in Making Principal a Party in Summary Proceedings.

The Court has awarded judgment against John Hancock Mutual Life Insurance Company in summary proceedings imposing a liability for interest where no liability previously existed. This summary judgment has been entered under the provisions of Rule 73 (f). It is to be noted that Rule 73 (f) provides only for a summary judgment against the surety on the bond and makes no provision for summary judgment against the principal on the bond. This remedy provided by Rule 73 is in addition to the obligee's other remedies on the bond. He could sue both the principal and the surety in an action of contract on the bond. There existed no reason for providing an additional remedy against the principal on a bond, for the reason that, if the principal were liable for damages, costs and interest, that liability could be enforced in the main proceedings to which the summary proceedings are merely ancillary. If the appellee had been entitled to

recover any sum from the appellant John Hancock Mutual Life Insurance Company by reason of its petition or by reason of the appeal, an order therefor could have been entered against said appellant on the original judgment appealed from or by direction in the mandate from the Circuit Court of Appeals. Rule 73 permits summary proceedings against the surety only, for the reason that the liability, if any, existing against the principal is established in the main proceedings. There are other equally valid reasons for such limitation. If the principal on the bond were to be held liable in summary proceedings, danger arises that there might be two judgments and two executions issued against the principal for the same cause. Any judgment apart from costs entered in summary proceedings must be limited to the amount of the judgment in the main proceedings for the reason that the summary proceedings are merely ancillary to and in aid of the main proceedings. The summary proceedings are not to be availed of for the purpose of enforcing new, additional or different substantive claims, but are to be availed of only for the purpose of enforcing the judgment entered in the proceedings to which it is ancillary. Serious constitutional questions relating to due process and trial by jury would arise if the ancillary proceedings were permitted to go beyond the scope of the main proceedings. The procedural defect in this case is a result of an attempt to do that indirectly which the District Court lacked authority to do directly, and confirms the lack of substantive right. It would be rather difficult to convince a court that liability should be imposed upon a surety when no such liability had been imposed upon the principal, thus the necessity existed of finding some means by which liability could be imposed upon the principal, so the principal was added as a party in the summary proceedings when no authority existed therefor. Remove the principal from the summary proceedings and the want of power in the

Court to enter the summary judgment appealed from becomes apparent.

Summary.

Because—

(1) there exists a question as to the interpretation of Federal Rules of Civil Procedure, Rule 73 (d), (e) and (f), of great importance, fundamental to the prosecution of appeals where supersedeas bonds are given, including a violation of Federal Rules of Civil Procedure, Rule 81 (7), and

(2) there exists a serious question as to the constitutionality of Federal Rules of Civil Procedure, Rule 73 (d), (e) and (f) as applied in the present case, and

(3) there exists a confusion and diversity of opinion as to the proper interpretation of Federal Rules of Civil Procedure, Rule 73 (d), (e) and (f) evidenced by the apparent conflict of opinion of the various circuit courts of appeals, and

(4) there has been a misinterpretation or improper application of decisions of the Supreme Court by the Circuit Court of Appeals, in the present case—

there is presented a case which ought to be reviewed by this Honorable Court.

Conclusion.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that the errors of the Circuit Court of Appeals for the First Circuit may be corrected, and in order that there may be an authoritative decision on supersedeas bonds under Federal Rules of Civil Procedure, Rule

73 (d), (e) and (f), and in order that there may be an authoritative decision as to the constitutionality of Federal Rules of Civil Procedure, Rule 73 (d), (e) and (f) as applied to the rights of sureties on supersedeas bonds respecting summary judgments against their principals, and to such an end a writ of certiorari ought to be granted, and this Court should review the decision of the Circuit Court of Appeals for the First Circuit and finally reverse it.

Respectfully submitted,

JOHN HANCOCK MUTUAL LIFE
INSURANCE COMPANY,
By its Attorney,
G. K. RICHARDSON.

FIDELITY AND DEPOSIT
COMPANY OF MARYLAND,
By its Attorney,
G. K. RICHARDSON.

Appendix.

Jurisdiction of Petition for Writ of Certiorari.

United States Code, 1940 Edition, Title 11, sec. 47 (c):

The Supreme Court of the United States is hereby vested with jurisdiction to review judgments, decrees, and orders of the Circuit Courts of Appeals of the United States and the United States Circuit Court of Appeals for the District of Columbia in proceedings under this title in accordance with the provisions of the laws of the United States now in force or such as may hereafter be enacted. (July 1, 1898, ch. 541, § 24, 30 Stat. 553; Feb. 13, 1925, ch. 229, §§ 1, 5, 13, 43 Stat. 936, 939, 941; May 27, 1926, ch. 406, § 9, 44 Stat. 664; June 7, 1934, ch. 426, 48 Stat. 926; June 22, 1938, ch. 575, § 1, 52 Stat. 854.)

Judicial Code, sec. 240, United States Code, 1940 Edition, Title 28, sec. 347 (a):

In any case, civil or criminal, in a circuit court of appeals, or in the United States Court of Appeals for the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted appeal. . . . (Mar. 3, 1911, ch. 231, § 240, 36 Stat. 1157; Feb. 13, 1925, ch. 229, § 1, 43 Stat. 938; Jan. 31, 1928, ch. 14, § 1, 45 Stat. 54; June 7, 1934, ch. 426, 48 Stat. 926.)

FEDERAL RULES OF CIVIL PROCEDURE:

Rule 62 (a) AUTOMATIC STAY; EXCEPTIONS—INJUNCTIONS, RECEIVERSHIPS, AND PATENT ACCOUNTINGS. Except as stated herein, no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 10 days after its entry. . . .

Rule 73 (d) SUPERSEDEAS BOND. Whenever an appellant entitled thereto desires a stay on appeal, he may present to the court for its approval a supersedeas bond which shall have such surety or sureties as the court requires. The bond shall be conditioned for the satisfaction of the judgment in full together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest, and damages as the appellate court may adjudge and award. When the judgment is for the recovery of money not otherwise secured, the amount of the bond shall be fixed at such sum as will cover the whole amount of the judgment remaining unsatisfied, costs on the appeal, interest, and damages for delay, unless the court after notice and hearing and for good cause shown fixes a different amount or orders security other than the bond. When the judgment determines the disposition of the property in controversy as in real actions, replevin, and actions to foreclose mortgages or when such property is in the custody of the marshal or when the proceeds of such property or a bond for its value is in the custody or control of the court, the amount of the supersedeas bond shall be fixed at such sum only as will secure the amount recovered for the use and detention of the property, the costs of the action, costs on appeal, interest, and damages for delay.

(e) FAILURE TO FILE OR INSUFFICIENCY OF BOND. If a bond on appeal or a supersedeas bond is not filed within the

time specified, or if the bond filed is found insufficient, and if the action is not yet docketed with the appellate court, a bond may be filed at such time before the action is so docketed as may be fixed by the district court. After the action is so docketed, application for leave to file a bond may be made only in the appellate court.

(f) JUDGMENT AGAINST SURETY. By entering into an appeal or supersedeas bond given pursuant to subdivisions (c) and (d) of this rule, the surety submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent upon whom any papers affecting his liability on the bond may be served. His liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court who shall forthwith mail copies to the surety if his address is known.

RULES OF THE UNITED STATES CIRCUIT COURT OF APPEALS:

Rule 10. 4. *Supersedeas Bond.* Whenever an appellant entitled thereto desires a stay on appeal, he may present to this court or the court below for its approval a supersedeas bond which shall have such surety or sureties as the court may require. The bond shall be conditioned for the satisfaction of the judgment in full together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest, and damages as this court may adjudge and award. When the judgment is for the recovery of money not otherwise secured, the amount of the bond shall be fixed at such sum as will cover the whole amount of the judgment remaining unsatisfied, costs of the appeal, interest, and damages for delay, unless this court or the court below after

notice and hearing and for good cause shown fixes a different amount or orders security other than the bond. When the judgment determines the disposition of the property in controversy, as in real actions, replevin, and actions to foreclose mortgages, or when such property is in the custody of the marshal, or when the proceeds of such property or a bond for its value is in the custody or control of the court, the amount of the supersedeas bond shall be fixed at such sum only as will secure the amount recovered for the use and detention of the property, costs of the action, costs on appeal, interest, and damages for delay. (Formerly Rule 37.)

Rule 33. 1. Where a judgment for the payment of money is affirmed, and interest is properly allowable, it shall be calculated from the date of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the state or territory where such judgment was rendered.

2. In all cases where an appeal delays proceedings on the judgment of the lower court, and appears to have been brought merely for delay, damages at a rate not exceeding ten per cent, in addition to interest, may be awarded upon the amount of the judgment.

3. The provisions of this rule shall be applicable to all cases in this court, except that in admiralty appeals, damages and interest may be allowed only if specially directed by the court.

GENERAL LAWS OF MASSACHUSETTS (TERCENTENARY EDITION):

Chapter 59, sec. 57: Date for payment of taxes. Interest. Taxes other than poll taxes shall be due and payable in every city, town and district in which the same are assessed,

in two equal instalments on July first and on October first of each year, and bills for the same shall be sent out not later than June fourteenth of each year. Interest shall be paid at the rate of four per cent per annum on all such taxes remaining unpaid after November first of the year in which they are payable, computed from October first of such year. Upon poll taxes unpaid when due, whether committed under section fifty-three of this chapter or under section four of chapter sixty, interest shall be paid at the rate of four per cent per annum, computed from the date when such taxes became due and payable. Bills for taxes assessed under section seventy-five shall be sent out not later than December twenty-sixth, and such taxes shall be payable not later than December thirty-first. If they remain unpaid after that date, interest shall be paid at the rate above specified, computed from December thirty-first until the day of payment, but if, in any case, the tax bill is sent out later than December twenty-sixth, said taxes shall be payable not later than ten days from the day upon which said bill is sent out, and interest shall be computed from the fifteenth day following the date when the tax becomes due. In all cases where interest is payable it shall be added to and become a part of the tax.

Chapter 60, sec. 37: Lien of tax upon real estate, levy by sale, validity of title.—Taxes assessed upon land, including those assessed under sections twelve, thirteen and fourteen of chapter fifty-nine, shall with all incidental charges and fees be a lien thereon from January first in the year of assessment. Except as provided in section sixty-one, such lien shall terminate at the expiration of two years from October first in said year, if in the meantime the estate has been alienated and the instrument alienating the same has been recorded, otherwise it shall continue until a recorded alienation thereof; but if while such lien is in force

a tax sale or taking has been made, and the deed or instrument of taking has been duly recorded within sixty days, but the sale or taking is invalid by reason of any error or irregularity in the proceedings subsequent to the assessment, the lien and also the lien or liens for any subsequent taxes or charges which have been added to the tax title account under authority of section sixty-one shall continue for ninety days after a surrender and discharge under section forty-six or a release, notice or disclaimer under sections eighty-two to eighty-four, inclusive, has been duly recorded, or for ninety days after the sale or taking has been finally adjudged invalid by a court of competent jurisdiction. If at any time while a lien established by this section is in force, a sale or taking cannot in the opinion of the collector be legally made because of any federal or state law or because of any injunction or other action of, or proceeding in, any federal or state court or because of the action of any administrative body, the lien, if the statement provided for in section thirty-seven A is filed, shall continue as provided in said section thirty-seven A, subject, however, to any lawful action under any paramount authority conferred by the constitution or laws of the United States or the constitution of the commonwealth. Said taxes, if unpaid for fourteen days after demand therefor, may, with said charges and fees, be levied by sale or taking of the real estate, if the lien or liens thereon have not terminated. No tax title and no item included in a tax title account shall be held to be invalid by reason of any error or irregularity which is neither substantial nor misleading, whether such error or irregularity occurs in the proceedings of the collector or the assessors or in the proceedings of any other official or officials charged with duties in connection with the establishment of such tax title or the inclusion of such item in the tax title account.

Chapter 107, sec. 3: Rate of interest.—If there is no agreement or provision of law for a different rate, the interest of money shall be at the rate of six dollars on each hundred for a year, but, except as provided in sections seventy-eight, ninety, ninety-two, ninety-six and one hundred of chapter one hundred and forty, it shall be lawful to pay, reserve or contract for any rate of interest or discount. No greater rate than that before mentioned shall be recovered in a suit unless the agreement to pay it is in writing.

Chapter 231, sec. 96: . . . An appeal from an order of the superior court shall be claimed within twenty days after it is made, and, except as otherwise herein provided, no judgment shall be entered while an appeal is pending. . . .

(2)

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Supreme Court of the United States

OCTOBER TERM, 1945
No. 822

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY ET AL.,
Petitioners,

vs.

DANIEL F. DONOVAN (BY SUBSTITUTION),
COLLECTOR OF TAXES FOR THE CITY OF BOSTON,
Respondent.

RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI.

WILLIAM H. KERR,
Attorney for Respondent.

CITY OF BOSTON PRINTING DEPARTMENT
1946

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Respondent.

RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI.

Introductory Statement.

This is a petition for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the First Circuit affirming a summary judgment entered by the United States District Court for the District of Massachusetts against the principal and surety upon a supersedeas bond filed in connection with the appeal decided by the opinion in *John Hancock Mutual Life Insurance Co.* v. *Thompson*, 147 F. (2d) 761, (C. C. A. 1st, 1944).

In the Circuit Court the record in the case at bar consisted of three parts: Record No. 4079; Record No. 4030, which was incorporated by reference in Record No. 4079 (R. 4079, p. 1); and Record No. 3930, which was in turn incorporated by reference in Record No. 4030 (R. 4030, pp. 1–2).

It is conceded that Record No. 3930 contains no matter essential to a consideration of the case; but, for the sake of completeness, attention is called to the fact that the petitioners have not filed Record No. 3930 with their petition.

Report of Opinions Below.

No opinion was delivered in the District Court with respect to its judgment.

The opinion of the Circuit Court is reported in 151 F. (2d) 751.

Jurisdiction.

The jurisdiction of this Honorable Court is invoked under U. S. C., Title 28, Section 347.

Statement of the Case.

This case stems from the proceeding begun by the United States in the United States District Court for the District of Massachusetts for the condemnation, for a term of years, of portions of the Hotel Buckminster at 645 Beacon Street, Boston, Massachusetts, owned by Carlton Hotel, Inc., Debtor (In Proceedings for the Reorganization of a Corporation, United States District Court for the District of Massachusetts, No. 67497), subject, among other encumbrances, to a first mortgage held by the petitioner John Hancock Mutual Life Insurance Company. In November, 1942, a declaration of taking was filed in conjunction with said proceeding, and simultaneously there was deposited with the District Court a sum of money representing the estimated compensation for the taking of the property to June 30, 1943. (R. 4030, p. 2.) In August, 1943, by the filing of an amendment to the declaration of taking and the deposit of the additional sum of $40,000, the property was

taken for the term commencing July 1, 1943, and ending June 30, 1944. (R. 4030, pp. 2–3, 29.)

On February 1, 1944, Merritt Thompson, Collector of Taxes for the City of Boston, filed a petition in the District Court praying that there be paid to him forthwith out of said sum of $40,000 the balance due the City of Boston on the 1942 real estate tax assessed to Carlton Hotel, Inc., on the Hotel Buckminster, as well as the amount of the 1943 tax assessed thereon to John Hancock Mutual Life Insurance Company, with costs and interest. (R. 4030, pp. 12–15.) On May 15, 1944, the Collector's petition for distribution was heard by the District Court. (R. 4030, p. 19.) On June 22, 1944, the District Court entered an order directing its Clerk

> "to pay forthwith to Merritt Thompson as he is collector of taxes for the City of Boston, from the moneys deposited on August 21, 1943 in the registry of this court for or on account of the just compensation to be awarded for the condemnation of the interest in land taken in the above-entitled proceeding, the sum of nineteen thousand nine hundred ninety-eight dollars and nine cents ($19,998.09), together with interest at the rate of $2.12 per day from May 15, 1944 to the date of payment, such disbursement being without prejudice to the right of the City of Boston or of the collector of taxes for the City of Boston to claim further and additional damages for the condemnation of the interest in land taken in the above-entitled proceeding." (R. 4030, p. 19.)

On June 30, 1944, the John Hancock Mutual Life Insurance Company appealed to the Circuit Court of Appeals for the First Circuit from said order of June 22, 1944, and filed, in connection with said appeal, a supersedeas bond in the sum of $1,000. (R. 4030, p. 30; R. 4079, pp. 2–3.) That

appeal was dismissed by the Circuit Court on December 22, 1944. *John Hancock Mutual Life Insurance Co.* v. *Thompson*, 147 F. (2d) 761.

On December 29, 1944, pursuant to the mandate from the Circuit Court and in accordance with the order of the District Court dated June 22, 1944, the Clerk of the District Court paid to the Collector the sum of $20,095.61, being the sum of $19,998.09 specified in said order with interest at the rate of $2.12 per day from May 15, 1944, when the petition for distribution was heard, to June 30, 1944, when the supersedeas bond was filed.

On January 4, 1945, the Collector filed a motion in the District Court that judgment be entered in his favor on the supersedeas bond against the principal and surety thereon and that execution issue for the damages suffered by him by reason of the delay occasioned by the filing of the supersedeas bond, for the costs on appeal, and for interest. (R. 4079, pp. 3–6.) On January 31, 1945, judgment was entered for the Collector against the principal and surety on the bond in the aggregate sum of $624.39, computed as follows:

Interest from June 30, 1944 (when supersedeas bond filed) to December 29, 1944 (when $20,095.61 paid out of registry of District Court) on $20,095.61 at 6% .	$601.22
Costs awarded by the Circuit Court in 147 F. (2d) 761	20.00
	$621.22
Interest at 6% on $621.22 from December 30, 1944, to January 31, 1945 (when judgment entered)	3.17
	$624.39

(R. 4079, pp. 6–7, 10–11.)

From the judgment so entered the principal and surety took an appeal to the Circuit Court, which affirmed the judgment of the District Court. *John Hancock Mutual Life Insurance Co.* v. *Hurley*, 151 F. (2d) 751. The instant petition seeks a review of the decision of the Circuit Court.

The petition for the writ of certiorari (p. 2) and the brief in support thereof (p. 8) both recite that the sum of $604.39 mentioned in the judgment of the District Court (R. 4079, p. 6) was arrived at by computing "interest at the rate of 6% per annum on said sum of $20,095.61 from June 30, 1944 (when the supersedeas bond was filed), to January 31, 1945 (the date of the summary judgment)." This is inaccurate. As indicated above, the sum of $604.39 was arrived at by computing interest at 6% on $20,095.61 from June 30, 1944 (when the supersedeas bond was filed) to December 29, 1944 (when the sum of $20,095.61 was paid out of the registry of the District Court) and adding thereto interest at 6% on $621.22 from December 30, 1944, to January 31, 1945 (when the summary judgment was entered). (R. 4079, pp. 10–11.)

Argument.

1. The petition should not be granted as to any question incorporated by reference.

The petition for the writ of certiorari (p. 5) states: "the petitioners here refer to and incorporate in this petition all of the matters presented in the 'Statement of the Points' (Record, p. 9) with the same force and effect as if herein set out in full." The petition should not be granted as to any question so incorporated by reference.

Rule 38 of the Rules of this Court relates to review on writ of certiorari. Paragraph 2 of that rule pertains to the contents of petitions for such review and provides in part as follows:

> "The petition shall contain a summary and short statement of the matter involved; a statement particularly disclosing the basis upon which it is contended that this court has jurisdiction to review the judgment or decree in question (See Rule 12, par. 1); the questions presented; and the reasons relied on for the allowance of the writ. Only the questions specifically brought forward by the petition for writ of certiorari will be considered. A supporting brief may be annexed to the petition or presented separately, but it must be direct and concise. (See Rules 26 and 27.) A failure to comply with these requirements will be a sufficient reason for denying the petition. . . ."

This provision plainly requires that the petition itself specify the questions presented. A great number of petitions for review on writ of certiorari are filed with this Court in the course of a year, and the obvious purpose of the provision quoted is to expedite the consideration of those petitions. See especially *Furness, Withy & Co.* v. *Yang Tsze Insurance Assn.*, 242 U. S. 430, 433, 434 (1917). If by an examination of the petition the Court cannot ascertain the questions presented, there is a needless consumption of the Court's time.

2. The petition should not be granted as to any specification of error assigned in the brief which is not embraced within the questions expressly presented by the petition.

The five questions specifically set forth in the petition (pp. 3–4) are not, in terms at least, the same as the five specifications of error assigned in the brief supporting the

petition (pp. 9–10). "Whether included in the petition, or separately presented, the supporting brief is not a part of the petition, at least for the purpose of stating the questions on which review is sought. The specifications of error in that brief do not expand or add to the questions stated in the petition." *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175, 178 (1938). Accordingly, certiorari should not be granted as to any specification of error assigned in the brief which is not included in the questions specifically brought forward by the petition.

3. The petition should not be granted as to Question 1 involving the construction of the order entered by the District Court on June 22, 1944.

The first specific question presented by the petition seeks a construction of the order for partial disbursement entered by the District Court on June 22, 1944 (R. 4030, p. 19). That order was clearly an order specially written to suit the circumstances of the particular case. Its construction, therefore, is of no great public importance. In *Layne & Bowler Corp.* v. *Western Well Works*, 261 U. S. 387, 393 (1923), this Court said that "it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties."

4. The petition should not be granted as to Question 2 concerning the District Court's power to add to, or detract from, its order of June 22, 1944.

The second question set out in the petition is whether the District Court could add to, or detract from, its order of June 22, 1944, after the appeal taken therefrom had been dismissed by the Circuit Court. This question is not open

on the record, for, so far as the record discloses, the District Court never purported to change or modify that order in any way. The mere interpretation of the order in the subsequent proceeding on the supersedeas bond did not add to, or detract from, the order, but simply declared its meaning.

5. The petition should not be granted as to Question 3 relative to the propriety of entering a summary judgment against the principal on a supersedeas bond.

The petitioners next seek to have this Court determine whether Federal Rules of Civil Procedure, Rule 73 (d), (e) and (f), shall be construed to permit making a principal on a supersedeas bond a party defendant in proceedings for summary judgment. While this precise question has never been passed upon, this Court has long recognized the power of courts to render summary judgments on appeal bonds. *Hiriart* v. *Ballon*, 9 Pet. 156, 166, 167 (1835); *Beall* v. *New Mexico*, 16 Wall. 535, 539, 540 (1872); *Pease* v. *Rathbun-Jones Engineering Co.*, 243 U. S. 273, 278, 279 (1917). Under the circumstances, there seems to be no special reason why this Court should now review the matter.

Further, Rule 73 (f) of the Federal Rules of Civil Procedure expressly provides that the liability of the surety upon a supersedeas bond may be enforced on motion without the necessity of an independent action. Summary judgment was therefore properly entered against the surety, and the surety makes no contention to the contrary. Thus, even if, upon certiorari, this Court should vacate the judgment as to the principal, the principal would gain only a technical advantage because of the surety's right to reimbursement. Consequently, Question 3 is of illusory, not real, importance.

The petitioners are confused when they say (Petition, p. 5): "Since supersedeas bonds are common in appeals, it is

desirable that it be finally determined whether sureties thereon are to be held liable, not only for judgments against their principals, but also for summary judgments against their principals." The surety here is not being held liable for a summary judgment against its principal, but for the failure of its principal to answer for the damages occasioned by the delay incident to the appeal. The liability of the surety was not conditioned upon the entry of a judgment against the principal with respect to those damages, but became absolute upon the mere failure of the principal to make amends for those damages.

6. The petition should not be granted as to Question 4 pertaining to the applicability of the Federal Rules of Civil Procedure to condemnation proceedings.

The fourth question raised by the petition is: "Do the Federal Rules of Civil Procedure apply, except with respect to appeals, to condemnation proceedings?" This question does not present a justiciable controversy, for the matter is settled by Rule 81 (a) (7) of the Federal Rules of Civil Procedure, which provides: "In proceedings for condemnation of property under the power of eminent domain, these rules govern appeals but are not otherwise applicable."

It is recognized that the Circuit Court relied on Rule 62 (a) of the Federal Rules of Civil Procedure when it interpreted the District Court's disbursement order of June 22, 1944, as directing the Clerk of the District Court to make payment upon the expiration of ten days after the entry of the order; but, as has already been observed, the construction of that order is not a matter of importance to the public and should not be reviewed on writ of certiorari. If the petitioners were aggrieved by the Circuit Court's

erroneous application of Rule 62 (a), they should have called the Circuit Court's attention to Rule 81 (a) (7) by a petition for a rehearing.

7. The petition should not be granted as to Question 5 regarding the Seventh Amendment of the United States Constitution.

The fifth and last question specifically set out in the petition inquires whether Rules 73 (d), (e) and (f) of the Federal Rules of Civil Procedure, if construed to permit the rendition of a summary judgment against the principal on a supersedeas bond, violate the Seventh Amendment of the United States Constitution preserving the right of trial by jury.

Both the petition (p. 3) and the brief in support thereof (p. 9) recite that the petitioners by their appeal to the Circuit Court challenged the judgment of the District Court on the constitutional ground stated. However, the Statement of Points (R. 4079, p. 9) does not mention any constitutional question, and the opinion of the Circuit Court does not indicate that any such question was considered. This Court should not issue a writ of certiorari to determine a question not assigned or considered in the Circuit Court. *Saltonstall* v. *Birtwell*, 164 U. S. 54, 70 (1896).

It may not be inappropriate to add, nevertheless, that the constitutional right of trial by jury presents no obstacle to summary proceedings in cases of this kind, since by entering into the bond the parties submit themselves to be governed by the fixed rules which regulate the practice of the court. *Pease* v. *Rathbun-Jones Engineering Co.*, 243 U. S. 273, 278 (1917), and cases cited.

8. The petition should not be granted with respect to the question whether, where a supersedeas on appeal delays the payment of a fund to a party determined to be entitled to the immediate possession thereof, the principal and surety on the supersedeas bond are liable to the appellee for the damages caused by the delay incident to the appeal, notwithstanding that the appellate court in disposing of the appeal makes no allowance on account of damages for delay either by way of interest or otherwise.

The principal question considered by the Circuit Court in the case at bar was whether, where a supersedeas on appeal delays the payment of a fund to a party determined to be entitled to the immediate possession thereof, the principal and surety on the supersedeas bond are liable to the appellee for the damages caused by the delay incident to the appeal, notwithstanding that the appellate court in disposing of the appeal makes no allowance on account of damages for delay either by way of interest or otherwise. The Circuit Court answered the question in the affirmative. The petitioners maintain that a negative answer should have been given. (Petitioners' Brief, pp. 10 ff.) Undoubtedly petitioners intended to bring the question forward; but, in view of their failure to set it out specifically in their petition, it is submitted that the question is not brought forward.

If the petition is construed to raise the question, however, a writ of certiorari should not issue; for the judgment which the petitioners here seek to have reviewed is supported by *Graysonia-Nashville Lumber Co.* v. *Goldman*, 260 F. 600 (C. C. A. 8th, 1919), certiorari denied 246 U. S. 663, and *Brame* v. *Keystone Credit Corp.*, 76 F. (2d) 328 (C. C. A. 4th, 1935), certiorari denied 296 U. S. 591, as well as by the numerous other cases cited in the learned opinion of the Circuit Court.

The petition (pp. 4–5) prays for the issuance of a writ because of an alleged conflict between the decision of the Circuit Court and the following cases: *Jerome* v. *McCarter*, 21 Wall. 17 (1874); *Supervisors* v. *Kennicott*, 103 U. S. 554 (1880); *Rosenstein* v. *Tarr*, 51 F. 368 (C. C. Mass., 1892), affirmed *per curiam*, 53 F. 112 (C. C. A. 1st, 1892); *Pike* v. *Gregory*, 118 F. 128 (C. C. A. 1st, 1902); and *Spruks* v. *United States Fidelity & Guaranty Co.*, 138 F. (2d) 812 (C. C. A. 3d, 1943).

In the petitioners' brief (p. 12) it is said: "The precise point here in issue was early determined in *Jerome* v. *McCarter*, 21 Wall. 17, and in *Supervisors* v. *Kennicott*, 103 U. S. 554, . . ." It is submitted that the precise point here in issue was not decided in those cases. Both of those cases involved a petition to foreclose a mortgage. The decrees appealed from adjudicated the amount of the debts due and directed that certain property be sold and the proceeds applied on account of the debts. The effect of the filing of the supersedeas bonds was to stay the mortgage foreclosure sales. To illustrate the situation, let us suppose that a debt of $1,000,000 was secured by property worth $50,000 at the time of the entry by the inferior court of the decree ordering the foreclosure sale, and that the value of the property remained constant while the appeal was pending. Obviously, the mortgagee was not deprived of the use of $1,000,000 during the pendency of the appeal, and the appellant is not liable for the interest accumulating thereon during that period. This, it is submitted, is all that was decided by *Jerome* v. *McCarter* and *Supervisors* v. *Kennicott*.

In the illustration just put, however, the mortgagee was deprived of the use of $50,000 during the pendency of the

appeal, for, had the foreclosure sale not been stayed by the supersedeas bond, the mortgagee could have realized $50,000 forthwith. The mortgagee was therefore entitled to damages to compensate him for the loss of the use of $50,000.

The distinction drawn in the illustration just given was drawn in *Graysonia-Nashville Lumber Co.* v. *Goldman*, 260 F. 600 (C. C. A. 8th, 1919), certiorari denied 246 U. S. 663, and in *American Trust Co.* v. *Speers Sand & Clay Works*, 60 F. (2d) 994 (D. C., Md., 1932). In the *American Trust Co.* case, Judge Chesnut of the District Court of Maryland, after ruling that the accumulation of interest was not within the liability of the bond, said (p. 999):

> "But I think it does not follow that no allowance for interest can be made in this case. The effect of the appeal from the decree for sale was to delay the sale for a period of about fourteen months. If this delay had not been occasioned by the unsuccessful appeal, the plaintiff would presumably have received interest on the final purchase price of $6,000 for this period, or would have had the fund of $6,000 finally realized at the end of 14 months available for earning interest fourteen months earlier. See *Jerome* v. *McCarter*, 21 Wall. 17. A similar allowance for interest on the delayed receipt of the purchase price was made against the surety on supersedeas bond in a mortgage foreclosure sale in *Graysonia-Nashville Lumber Co.* v. *Goldman*, 260 F. 600, 605. The allowance was made not for the accumulation of interest on the mortgage debt but as an item of damages for delay incident to the appeal."

In *Graysonia-Nashville Lumber Co.* v. *Goldman, supra*, the supersedeas bond caused the postponement of the foreclosure sale from July 10, 1917, to April 29, 1918, when

the property was sold for $250,000. In the course of the opinion (p. 605), the Court states:

> "It is said that it was error to allow this interest, because interest is never allowed on any decree that is not for a sum of money or is silent as to interest, and that there was no judgment for money against the Graysonia Company [the appellant], and no provision for interest in the decree of foreclosure. But this $12,040 is not interest on any judgment, or on the decree, or on the amount thereof. It is the legal damages the plaintiff sustained because the Graysonia Company delayed his receipt of the $250,000 derived from the sale from June [July?] 10, 1917, to April 29, 1918."

It follows that the opinions in *Jerome* v. *McCarter, supra,* and *Supervisors* v. *Kennicott, supra,* are not in conflict with the conclusion reached by the Circuit Court in this case.

Since *Rosenstein* v. *Tarr, supra,* and *Pike* v. *Gregory, supra,* arose in the same circuit as the instant case, the effect of the decision of the Circuit Court in the present controversy is to overrule those cases. No case has been found where this Court granted certiorari merely because a circuit court overruled itself.

Spruks v. *United States Fidelity & Guaranty Co.,* 138 F. (2d) 812 (C. C. A. 3d, 1943), is distinguishable. The bond was given on September 29, 1936. See *Spruks* v. *United States Fidelity & Guaranty Co.,* 45 F. Supp. 773 (D. C., M. D. Penn., 1942). Hence, just as *Rosenstein* v. *Tarr, supra,* and *Pike* v. *Gregory, supra, Spruks* v. *United States Fidelity & Guaranty Co.,* 138 F. (2d) 812 (C. C. A. 3d, 1943), involves a bond given prior to the effective date of the Federal Rules of Civil Procedure. (See Rule 86.)

Conclusion.

In conclusion, attention is called to two additional matters. First, the prior appeal in the case at bar was not considered on its merits but was dismissed because the appellant was not aggrieved by the order below. It is inconceivable that a party having no appealable interest can delay the distribution of a fund and yet avoid answering for the damages resulting from such delay, especially when such party has given bond agreeing to "answer all damages and costs if it fails to make its appeal good."

Further, the earlier appeal might have been prosecuted without a supersedeas, but it was elected not to do so. Having elected to take this course, it is only just that those responsible for the delay in the payment of the fund to the person entitled to it should respond in damages in a sum equal to the amount of the loss brought about by the course pursued. *Brame* v. *Keystone Credit Corp.*, 76 F. (2d) 328, 331, 332 (C. C. A. 4th, 1935), certiorari denied 296 U. S. 591.

"A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor." Rules of the Supreme Court, Rule 38 (5). It is respectfully suggested that there is no special and important reason to review a judgment assessing damages against one in a position closely resembling that of an officious intermeddler, who, having elected to take a certain course, seeks to avoid answering for the damages resulting from the course pursued.

For the various reasons set forth above, it is submitted that the petition for a writ of certiorari should be denied with costs to the respondent.

Respectfully submitted,

DANIEL F. DONOVAN, as he is
Collector of Taxes for the City of Boston,

By WILLIAM H. KERR,
His Attorney.

APPENDIX.

Federal Rules of Civil Procedure.

Rule 73. Appeal to a Circuit Court of Appeals.

(*a*) *How Taken.* When an appeal is permitted by law from a district court to a circuit court of appeals and within the time prescribed, a party may appeal from a judgment by filing with the district court a notice of appeal. Failure of the appellant to take any of the further steps to secure the review of the judgment appealed from does not affect the validity of the appeal, but is ground only for such remedies as are specified in this rule or, when no remedy is specified, for such action as the appellate court deems appropriate, which may include dismissal of the appeal.

(*b*) *Notice of Appeal.* The notice of appeal shall specify the parties taking the appeal; shall designate the judgment or part thereof appealed from; and shall name the court to which the appeal is taken. Notification of the filing of the notice of appeal shall be given by the clerk by mailing copies thereof to all the parties to the judgment other than the party or parties taking the appeal, but his failure so to do does not affect the validity of the appeal. The notification to a party shall be given by mailing a copy of the notice of appeal to his attorney of record or, if the party is not represented by an attorney, then to the party at his last known address, and such notification is sufficient notwithstanding the death of the party or of his attorney prior to the giving of the notification. The clerk shall note in the civil docket the names of the parties to whom he mails the copies, with date of mailing.

(c) *Bond on Appeal.* Whenever a bond for costs on appeal is required by law, the bond shall be filed with the notice of appeal. The bond shall be in the sum of two hundred and fifty dollars, unless the court fixes a different amount or unless a supersedeas bond is filed, in which event no separate bond on appeal is required. The bond on appeal shall have sufficient surety and shall be conditioned to secure the payment of costs if the appeal is dismissed or the judgment affirmed, or of such costs as the appellate court may award if the judgment is modified. If a bond on appeal in the sum of two hundred and fifty dollars is given, no approval thereof is necessary. After a bond on appeal is filed an appellee may raise objections to the form of the bond or to the sufficiency of the surety for determination by the clerk.

(d) *Supersedeas Bond.* Whenever an appellant entitled thereto desires a stay on appeal, he may present to the court for its approval a supersedeas bond which shall have such surety or sureties as the court requires. The bond shall be conditioned for the satisfaction of the judgment in full together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest, and damages as the appellate court may adjudge and award. When the judgment is for the recovery of money not otherwise secured, the amount of the bond shall be fixed at such sum as will cover the whole amount of the judgment remaining unsatisfied, costs on the appeal, interest, and damages for delay, unless the court after notice and hearing and for good cause shown fixes a different amount or orders security other than the bond. When the judgment determines the disposition of the property in controversy as in real actions, replevin, and

actions to foreclose mortgages or when such property is in the custody of the marshal or when the proceeds of such property or a bond for its value is in the custody or control of the court, the amount of the supersedeas bond shall be fixed at such sum only as will secure the amount recovered for the use and detention of the property, the costs of the action, costs on appeal, interest, and damages for delay.

(*e*) *Failure to File or Insufficiency of Bond.* If a bond on appeal or a supersedeas bond is not filed within the time specified, or if the bond filed is found insufficient, and if the action is not yet docketed with the appellate court, a bond may be filed at such time before the action is so docketed as may be fixed by the district court. After the action is so docketed, application for leave to file a bond may be made only in the appellate court.

(*f*) *Judgment against Surety.* By entering into an appeal or supersedeas bond given pursuant to subdivisions (*c*) and (*d*) of this rule, the surety submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent upon whom any papers affecting his liability on the bond may be served. His liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court who shall forthwith mail copies to the surety if his address is known.

(*g*) *Docketing and Record on Appeal.* The record on appeal as provided for in Rules 75 and 76 shall be filed with the appellate court and the action there docketed within 40 days from the date of the notice of appeal; except that, when more than one appeal is taken from the same judgment to the same appellate court, the district court may prescribe the time for filing and docketing, which in no event shall be less than 40 days from the date of the first notice of appeal.

In all cases the district court in its discretion and with or without motion or notice may extend the time for filing the record on appeal and docketing the action, if its order for extension is made before the expiration of the period for filing and docketing as originally prescribed or as extended by a previous order; but the district court shall not extend the time to a day more than 90 days from the date of the first notice of appeal.